

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARGARET RUDIN,

Petitioner,

v.

CAROLYN MYLES, *et al.*,

Respondents.

Case No. 2:11-cv-00643-RFB-EJY

ORDER

This habeas matter under 28 U.S.C. § 2254 is pending before the Court for final disposition and also on a Motion for Enlargement of Time by Respondents (ECF No. 83). On August 9, 2019, the Court issued an order directing the parties to address several issues with the federal record. (ECF No. 81.) While both parties have responded, it does not appear that the parties have fully complied with the order.

Flawed Exhibits

The prior order referred to multiple flaws in the exhibits and exhibit list filed by Respondents, based on the Court's preliminary review. (ECF No. 81, at 1-2.)

The order clearly stated that the careless manner of filing reflected in Respondents' exhibit filing could not be tolerated:

The Court therefore is unable to confidently rely upon respondents' exhibits as reflecting a correct, complete (as to relevance), and accurate representation of what was filed in

1 the state court record. Nor can the Court confidently rely upon
2 respondents' index of exhibits to reliably navigate through the
3 voluminous exhibits in this matter.

4 The Court cannot accept this situation given its
5 obligations as recognized in *Nasby*. The Court therefore must
6 direct respondents to certify, as specified at the end of this
7 order, that: (a) respondents' staff has re-reviewed every single
8 page of the exhibits and index of exhibits on file; (b) all errors
9 in the exhibits and index of exhibits have been corrected; and
10 (c) to the best of respondents' knowledge, there are no more
11 errors in the exhibits and index of exhibits filed in the federal
12 record.

13 The Court understands that the record is voluminous,
14 filling the equivalent of five copy paper boxes in hard copies.
15 But that heightens – not lessens – the need to do the filing
16 right.

17 The Court further understands that it is not generally
18 feasible for counsel to individually prepare the state court
19 record exhibits for filing, and that counsel necessarily must
20 rely on staff assistance. In the final analysis, however,
21 counsel's duty to file a correct representation of the underlying
22 state court record materials is nondelegable. The Court trusts
23 that, after corrected materials are filed in response to this
24 order, a second order in this regard will not be necessary. If
25 it is, that order instead will direct counsel to personally review
26 all of the exhibits, again page by page, and certify the
27 correctness of his filing, without reliance on any delegation to
28 staff whatsoever. The careless manner of filing reflected in
the multiple examples noted in this order cannot be tolerated.

(ECF No. 81, at 2.)

21 Respondents' thereafter filed purportedly corrected exhibits. Counsel certified
22 "that Respondents have, to the best of their ability, reviewed the state court record in this
23 matter and endeavored to correct any errors in the index." (ECF No. 84, at 2.)

24 However, the Court is still encountering substantial flaws in the state court record
25 exhibits filed by Respondents, in what so far has been only a partial continuing review of
26 the record. For example, Exhibit 204, a transcript from a day early in the trial, stops
27
28

1 midsentence on page 200 and clearly is missing over 109 pages. (Compare ECF No. 66-
2 8, at 5 with ECF No. 66-9, at 103.)

3 The Court finds it difficult to believe that a conscientious, competent, and thorough
4 second review of the state court record exhibits filed herein could have missed such a
5 glaring flaw. Moreover, the materials filed by Respondents in response fail to correct
6 numerous errors, including those specifically identified in the Court's prior order.

7 The order noted that Exhibits 59 and 61 have apparent imaging/scanning errors.
8 Corrected exhibits have not been filed, and Respondents' Notice of Partial Compliance
9 provides no explanation. (See ECF Nos. 58-19, 59-1, 84.)

10 At least three of Respondents' replacement exhibits have the same scanning error
11 as the original exhibits. (Compare ECF No. 65-12 at 70 with ECF No. 85-10 at 298;
12 compare ECF No. 65-19 at 94-95 with ECF No. 85-11 at 209-10; compare ECF No. 66-
13 18 at 35 with ECF No. 85-14 at 35.) It is not clear to the Court exactly what, if anything,
14 was corrected by the replacement exhibits. It is highly unlikely that the Court Reporter's
15 underlying original transcripts in the official state court record had errors of this nature.

16 The Court acknowledges the extensive effort expended by counsel in responding
17 to the prior order. However, these continued patently obvious flaws in the record
18 presented to this Court cannot—and will not—be tolerated again. This federal habeas
19 case has been pending for over nine years. The combined state and federal litigation
20 further span two decades, with the 76-year-old petitioner recently having been paroled
21 from physical custody on the second of her two ten-to-life sentences. The Court has a
22 fundamental obligation—regardless of the ultimate outcome—to see that justice, to all
23 concerned, is not denied by further delay. And it must have a reliable, unflawed record
24 upon which to do so.

25 The Court is now forced to issue the second order referred to in the prior order.
26 Respondents' counsel must—individually—review the state court record exhibits on file
27 in this matter—individually, page by page—and thereafter personally certify to this Court
28 following that review that all errors and flaws in the federal filing of the state court record

exhibits have been corrected. If the Court finds further errors thereafter, the Court will be left with no other alternative than to sanction Respondents' counsel personally for the failure to provide the Court with a reliable record after it has issued two compliance orders. Given the duration of these proceedings, further failure in this regard will not be tolerated; and sanctions instead will be imposed personally on counsel, with a proviso against indemnification of counsel by the State. Respondents' counsel must take all steps necessary to assure that the Court has a reliable record upon which to base a decision.

Video of Opening Statement

In the First Amended Petition, Petitioner made numerous references to an "Exhibit A" with a video of the Defense's opening statement. Yet there was no such video in the federal record. (See ECF No. 81 at 4.) At this late juncture in this case—with an Answer and Reply having been filed and the case submitted for decision—the Court established a procedure governing the consideration of video that was not an official state court record. The Court ordered that "[P]etitioner, if she wishes for the Court to consider any video exhibits not then on file [at the time of Respondents' responses], *shall file a motion* for the admission of the video exhibits, *supported by directly apposite authority* along with presentation of the proposed exhibits as manually-filed exhibits submitted *with the motion*." (ECF No. 81, at 6.) (emphasis added.)

Petitioner did not file such a motion as directed by the Court. Her counsel instead filed, along with a Second Amended Petition, an attachment designated as "Exhibit A," which references the video exhibit and includes declarations by Petitioner's current counsel and a juror from the 2001 trial. (ECF Nos. 86-1, 86-2, 86-3, 87.) Counsel then overnighted a flash drive with the video itself to the Court's Courtroom Administrator.

In his Declaration, counsel asserts, *inter alia*, that: (a) "the trial was broadcast nationally on Court TV" and also locally in Las Vegas (ECF No. 86-2 at 1); (b) former postconviction counsel Christopher Oram "had boxes full of the VHS videotapes of Rudin's trial" (*id.*); (c) Petitioner told current counsel that "she had a friend in Las Vegas who taped the trial as it was aired on local TV" and these are the videotapes counsel

1 received from Oram (id.); (d) “[t]he tapes were dirty and had dust and mouse droppings
2 in many of the boxes” (id.); (e) he “was able to digitize many of the tapes of the trial” (id.
3 at 2); and (f) “none of the video of Amador’s opening statement was altered in any way,
4 other than sometimes there were issues of syncing the video and audio” (id.)

5 It is therefore clear that the video is not an official state court record, nor a copy
6 obtained directly from a news source that broadcast the trial. The video provided is
7 instead a “bootleg” copy of a television broadcast made by Petitioner’s friend that was
8 digitized by Petitioner’s counsel nearly two decades later, with counsel of record seeking
9 to serve as a foundation witness for its introduction as an exhibit.¹

10 The Court directed that the admissibility of any such unofficial video be determined
11 on a contested motion because there is a substantial legal question as to whether the
12 Court can properly consider it, in lieu of or in addition to the extant official transcript and
13 regardless whether the Court ultimately applies *de novo* review. (See ECF No. 81 at 4
14 n.3.) Petitioner seeks to present an exhibit subject to a substantial legal question after
15 the pleadings have been closed and after referring extensively to it but failing to produce
16 it over three years ago in the First Amended Petition. The Court directed that the
17 substantial legal question be addressed on a contested motion so that the matter could
18 be definitively resolved prior to a final decision in the case.

19 The Court’s order that Petitioner must present apposite authority means that
20 Petitioner must present authority establishing that a federal court can consider an
21 unofficial video of a state criminal trial proceeding when adjudicating a habeas petition
22 where the official transcript of that proceeding exists. Petitioner’s argument urging that
23 the video is properly authenticated does not meet this standard. Petitioner presents no
24 apposite case law or other authority on this controlling issue.

25 Judicial and legislative rules regarding broadcasts of criminal trials implicate
26 substantial public policy concerns regarding the integrity of court judgments. See, e.g.,

27 ¹ The prior order directed Respondents first to clarify whether there was an official video record
28 from the trial. (ECF No. 81 at 5.) Respondents did not do so. Regardless, Petitioner’s response clearly
establishes that the video is not an official state court record.

1 Hollingsworth v. Perry, 558 U.S. 183, 196-98 (2010). The Supreme Court of Nevada rules
 2 authorizing the broadcast of state judicial proceedings clearly provide now and at the
 3 relevant time, that the broadcast material does not constitute an official record of the
 4 proceeding:

5 **Official record.** The official court record of any proceeding
 6 is the transcript of the original notes of the court reporter or
 7 court recorder made in open court. Videos, photographs or
 8 audio reproductions made in a court proceeding as a result of
 these rules shall not be considered as part of the official court
 record.

9 Supreme Court Rule 241(2).² This rule precludes reliance upon an unofficial video of trial
 10 proceedings on an appeal from a conviction. See, e.g., Fugate v. Commonwealth, 62
 11 S.W.3d 15, 21 (Ky. 2001).

12 It is one thing to receive new evidence on relevant underlying factual matters in
 13 federal court on *de novo* review. It is another to consider an unofficial broadcast of a trial
 14 in lieu of or in addition to the official state court record, where an official transcript of the
 15 proceeding is in the federal record and the state Supreme Court's rules dictate that the
 16 official transcript rather than a broadcast constitutes the official state court record. Absent
 17 some directly apposite, binding authority supporting the consideration of an unofficial
 18 broadcast of a trial, such a broadcast should not be considered in a federal habeas
 19 proceeding where the official transcript is available, as it is here.³

20 _____
 21 ² Prior to a 2011 amendment the pertinent language read: "Official Record. Reproductions made in
 22 court as a result of these rules shall not be considered as part of the official court record." See Christo
Lassiter, An Annotated Descriptive Summary of State Statutes, Judicial Codes, Canons, and Court Rules
Relating to Admissibility and Governance of Cameras in the Courtroom, 86 J. Crim. L. & Criminology 1019,
 1056 (1996).

23 ³ In support of her authenticity argument, Petitioner presents, *inter alia*, a declaration from a juror
 24 that the video corresponds to her observation of the opening statement nearly two decades earlier at trial.
 25 (ECF Nos. 86-2, 87.) Petitioner further suggests that the video is "self-authenticating" because of the
 26 existence of the official transcript of the opening statement. (ECF No. 86-1 at 2.) At the same time,
 27 however, Petitioner refers to transcription errors in the official transcript. (*Id.*) Petitioner therefore suggests
 28 that the unofficial video (purportedly rendered authentic and admissible due to the existence of the official
 transcript) rather than the official transcript is the conclusive source as to what was said during the opening
 statement. In all events, the authenticity argument does not address the threshold legal question as to
 whether the unofficial video may be considered in the first instance. The Court expresses no opinion as to
 potential issues raised by counsel of record serving as a witness in this matter and/or as to the scope of
 permissible testimony by the trial juror.

1 When the Court directs a party to follow a particular procedure, as it did in its prior
 2 order, counsel must comply absent an order granting reconsideration. Petitioner must
 3 comply with the procedure outlined in the Court's orders to secure possible consideration
 4 of the video exhibit, for the reasons discussed *supra*.⁴

5 Retainer Agreement

6 The Court acknowledges Respondents' efforts to obtain a copy of the Retainer
 7 Agreement—currently a sealed document on the “left side” of the state court record—by
 8 filing a Motion to Unseal in the state district court on September 20, 2019. The minutes
 9 on the online docket for the state district court reflect that the court orally granted a motion
 10 to unseal the retainer agreement on November 25, 2019, with the State to furnish a written
 11 order. This Court will allow Respondents a reasonable time to file a copy of the Retainer
 12 Agreement as an exhibit in the federal record.

14 Conclusion

15 The Court again acknowledges the extensive effort expended by both counsel in
 16 responding to the prior order. Nonetheless, counsel failed to fully comply.⁵ Counsel need
 17 to carefully adhere to and fully and expeditiously comply with the Court's orders. After
 18 nearly two decades of litigation pertaining to this conviction, this habeas action must be
 19 resolved justly, promptly, and on an appropriate record. (See also ECF No. 81 at 4.)

20 IT IS THEREFORE ORDERED that, within **sixty (60) days** of entry of this order,
 21 Respondents' counsel shall: (1) personally review, page by page and without delegation
 22 to staff, each exhibit filed by Respondents herein, and compare all errors therein to the
 23 original state court record; (2) ensure that corrected exhibits are filed herein that correct

25 ⁴ The Court will not review the video on YouTube as suggested by counsel. (ECF No. 86-2 at 2.)
 26 The Court will not adjudicate a federal habeas action based upon an unofficial video uploaded to a video-
 27 sharing platform that is neither part of the federal nor state court record.

28 ⁵ In addition to the instances noted, Petitioner failed to properly cite exhibits in her pleading. The
 order directed Petitioner to cite exhibits filed by Respondents “by reference to the ECF number and
 electronic docketing page number of the filing in the federal record.” (ECF No. 81 at 5.) Counsel instead
 cited exhibits by exhibit and page number in the underlying document. The Court will not make counsel
 correct the substantial filing, but both counsel must exercise greater care in following the Court's orders.

1 all flaws in Respondents' exhibits that are not also contained in the original state court
2 record; and (3) certify in an express, separate, standalone notice filed with this Court
3 specifically that: (a) counsel has personally reviewed, page by page and without
4 delegation to staff, each exhibit filed by Respondents herein; and (b) to the best of
5 counsel's knowledge and belief, following a diligent effort to fully comply with this order,
6 all flaws in Respondents' exhibits that are not contained within the original state court
7 record have been corrected. The notice shall specifically identify any flaws that remain
8 in Respondents' exhibits that are also present in the original state court record.

9 IT IS FURTHER ORDERED that no substitutions of counsel for Respondents will
10 be recognized by the Court that would relieve current counsel of the obligation to timely
11 comply with this order.

12 IT IS FURTHER ORDERED that any substitute exhibits filed in response to this
13 order shall be designated as such with a suffix to the prior exhibit or partial exhibit number
14 in a manner that distinguishes the corrected exhibit from the prior exhibit that is being
15 corrected, including any prior attempts to correct the exhibit. Respondents should not
16 refile the entire set of state court record exhibits including exhibits already on file that
17 have no errors.

18 IT IS FURTHER ORDERED that within **sixty (60) days** of entry of this order,
19 Respondents shall file a copy of the Retainer Agreement between Michael Amador and/or
20 his firm and Margaret Rudin. Given that the state district court has acted to unseal the
21 Retainer Agreement, the copy of the agreement need not be filed under seal in this matter.

22 IT IS FURTHER ORDERED that Respondents' Motion for Enlargement of Time
23 (ECF No. 83) is GRANTED *nunc pro tunc*.


24 IT IS FURTHER ORDERED that the flash drive video exhibit submitted by
25 Petitioner is rejected at this time without prejudice, for failure to follow both the Court's
26 prior order and Local Rule LR IC 1-1(d) regarding manual filing. Petitioner shall have
27 **thirty (30) days** within which to file: (a) a motion for the admission of the video exhibit,
28 (b) supported by directly apposite authority, in addition to (c) simultaneous submission of

1 the proposed exhibit as a manually-filed exhibit in the manner required by Local Rule LR
2 IC 1-1(d). Briefing on the motion must be in accordance with the local rules and requests
3 for extension of time are strongly discouraged. Repeated failure to follow the procedures
4 required by this and the prior order will result in the exclusion of the video exhibit from the
5 Court's consideration.

6 The Court requests that the Courtroom Administrator return the flash drive to
7 counsel in a manner consistent with the Clerk of Court's practices.

8 IT IS FURTHER ORDERED that any requests for extension of time with respect
9 to any deadline set by this order are strongly discouraged. Any such requests for
10 extension of time based upon scheduling conflicts with matters in this or any other court,
11 including the Ninth Circuit, must indicate that: (a) the other matter was filed prior to the
12 original April 25, 2011, filing date of this matter; and (b) counsel has timely provided the
13 other court with this order, and that court has both acted upon and denied a timely request
14 for extension of time sought in full or in part due to the deadlines set by this order. A copy
15 of the order(s) denying the request(s) for extension of time in the other court(s) must be
16 attached with the Motion for Extension of Time. This Court reiterates its intention to
17 secure full compliance with this order and bring this matter to a conclusion as
18 expeditiously as possible, subject only to a contrary order by the Ninth Circuit.

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20 DATED: July 15, 2020.

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24 RICHARD F. BOULWARE, II
25 United States District Judge
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